IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 1331

ESKEL NORBECK,
Petitioner,

vs.

DAVENPORT COMMUNITY SCHOOL DISTRICT: H. H. WEST: JACK SMIT: DALE E. PAUSTIAN: LAFAYETTE J. TWYNER, Individually and in Their Capacity as Members of the Board of Directors of the Davenport School Community District,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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STATEMENT OF THE CASE

Eskel Norbeck (Petitioner) was terminated from his position as principal of Davenport (Iowa) Central High School in May 1973. Respondents are all members of the Board of Education who voted to terminate his contract. At that time Iowa

had no teacher tenure law. Petitioner was accorded all applicable rights under Iowa's teacher termination statute. (§ 279.13 Code of Iowa 1973.)

Among these rights was the right to be informed of the reasons for dismissal. Petitioner was advised that reasons for his termination included: poor performance in his job; poor judgment; failure to provide leadership and good discipline; and inability to relate to parents. Of eight specific examples supporting these reasons, Petitioner complains of only one: "Conflict of interest resulting from your acting as chief negotiator for the Davenport Education Association (D.E.A.)." Other examples related to problems concerning order and discipline, teacher evaluation and lack of good judgment. See Petitioner's Petition for a Writ of Certiorari at p. 6.

Petitioner's claims were tried to a jury in the United States District Court for the Southern District of Iowa. The trial lasted approximately two weeks. Respondents made timely motions for a directed verdict which were denied. Thereafter the jury was instructed that if Petitioner's activities in the D.E.A. were a substantial factor in the Respondents' decision to terminate, then it was required to find that Respondents had voted to terminate for an impermissible reasons. The jury was also instructed to balance Petitioner's First Amendment rights to freedom of association against Respondents' interest in maintaining order and efficiency in the public schools. The jury returned a verdict in favor of all Respondents.

The United States Court of Appeals for the Eighth Circuit affirmed the judgment for Respondents. In its opinion the Court of Appeals decided, *inter alia* that Petitioner had not generated a fact question for the jury and that the trial court should have granted Respondents' motions for directed verdict. The Petition for a Writ of Certiorari is a result of the Court of Appeals' judgment.

ARGUMENT

I

Petitioner Has Not Shown Sufficient Reasons to Support a Writ of Certiorari

The Supreme Court's review of a Circuit Court's decision is "not a matter of right but of sound judicial discretion . . . granted only where there are special and important reasons therefor." Rule 19(1), Rules of the Supreme Court of the United States. It is reserved for review of conflicts between decisions of the various courts of appeals; to settle important questions of federal law; or to correct decisions made in conflict with applicable decisions of this Court. See generally, Rule 19(1)(b), Rules of the Supreme Court of the United States.

Even assuming, arguendo, Petitioner correctly states the law to be applied on submission of First Amendment claims to a jury, he still fails to show any impropriety on the part of the Court of Appeals in this action. The Seventh Amendment does not permit, nor require, a submission to the jury when plaintiff fails to meet his burden of proof. A court of appeals may independently evaluate the question of submissibility.

In *Neely v. Eby Construction Co.*, 386 U.S. 317 (1967) the following question was presented for review:

> "Do Rules 50(d) and 38(a) Federal Rules of Civil Procedure and the Seventh Amendment to the Constitution of the United States preclude the Court of Appeals from instructing the trial court to dismiss an action wherein the trial court denied the defendant's motions for a new trial and for judgment notwithstanding the verdict and entered judgment for plaintiff?" 386 U.S. at 321 fn. 3.

This Court answered in the negative:

> "As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment *n.o.v.* than when a trial court does; consequently there is no constitutional bar to an appellate court granting judgment *n.o.v.*" 386 U.S. at 322.

And further that:

> "[t]he purpose of Rule 50 to speed litigation and avoid unnecessary retrials would not be served if there were an ironclad rule that the court of appeals could never order a dismissal or judgment for defendant when plaintiff's verdict has been set aside on appeal." 386 U.S. at 326.

In light of the *Neely* court's ruling, it should be self-evident that the Circuit Court's action in the instant case involves no restriction on the right to trial by jury. (Compare this Court's action in *United States v. Generes*, 405 U.S. 93 (1972). Petitioner has demonstrated no significant or important reason to review the Circuit Court's action.

II

The Circuit Court of Appeals Properly Decided Petitioner's Appeal

Petitioner's arguments concerning the opinion issued by the Eighth Circuit Court of Appeals beg the question concerning the Seventh Amendment right to trial by jury. It is well settled that although the Seventh Amendment preserves the right to trial by jury and prevents facts tried by a jury from being "otherwise reexamined in any court of the United States" the court's inherent power concerning such matters of law as admissibility of evidence and submission of fact questions to the jury remains inviolate. See e.g., *Galloway v. United States*, 319 U.S. 372 (1943).

This is reflected in 28 U.S.C. § 2106 which permits the Supreme Court or any other appellate court to "affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review." This statute does not permit the appellate court to reexamine facts determined by a jury, but rather to consider the law as applied by the trial court. See also, Federal Rules of Civil Procedure 38(a) and 50(a) and (b).

In the case at bar, Petitioner concedes that he received a jury trial after which an adverse verdict was returned against him. This verdict was affirmed on appeal. Petitioner's contention that the Circuit Court reexamined facts which had been before the jury is puerile. Obviously, the Circuit Court was obligated to review the record, but only to determine whether Petitioner's evidence generated a material issue of fact for submission to the jury. See, *O'Neill v. Kiledjian*, 511 F.2d 511, 513 (6th Cir. 1975). See also, *Brady v. Southern Ry. Co.*, 320 U.S. 476 (1943). The appellate court's opinion makes clear that this limited factual review occurred. At page A-9 of Petitioner's Petition for Certiorari, the Eighth Circuit is quoted:

> "Whether Norbeck was lawfully exercising a constitutional right was a question for the Court and not for the jury. We find, even assuming the truth of Norbeck's contention, that the evidence failed to show any infringement of a constitutional right and should not have been submitted to the jury as a possible basis of recovery under Section 1983." 545 F.2d 63, 68 (8th Cir. 1976).

It is also apparent the Circuit Court considered Norbeck's allegations and accepted as true the supportive evidence adduced at time of trial. The Court then determined that Petitioner failed to carry his burden of proof and the district court erred in submitting the case to the jury rather than directing a verdict for all defendants.

It is well settled that the Seventh Amendment does not deprive "the federal courts of power to direct a verdict for insufficiency of evidence, . . ." *Galloway v. United States, supra,* 319 U.S. at 389. Petitioner apparently seeks to have this Court state that speculation may be substituted for facts in determining whether a case should be submitted for jury determination. *Cf. Galloway, supra,* 319 U.S. at 395.

The Court's inherent ability to police the jury's consideration of facts was recognized in *Pernell v. Southall Realty,* 416 U.S. 363 (1974). Justice Marshall therein restated the ability of the trial court to control a jury by the use of its power to direct a verdict, to grant judgments notwithstanding the verdict, or to grant a new trial. 416 U.S. at 368. Of course in this instance the trial court did not direct a verdict but rather submitted the case to a jury. Therefore if error exists, it is harmless error for the reason that plaintiff received more than that to which he was entitled. The Court of Appeals properly reviewed as a matter of law the trial court's decisions concerning the submissibility of the case and determined that the district court had erred. No other factual review occurred, and the Circuit Court certainly did not "reexamine" facts tried by the jury.

The district court's charge to the jury included a requirement that the jury balance Petitioner's interest in being chief negotiator for the teacher's union against the Respondents' interest in preserving and fostering the efficiency of the public schools. The jury was instructed that if Norbeck's role as a negotiator played any part in the decision to terminate him the termination was void. Under the rationale of *Mount Healthy City School District v. Doyle,* 45 U.S.L.W. 4079 (U.S. January 11, 1977), these instructions were clearly error, but once again they were harmless for the reason that the law as it presently stands will not permit a public employee to shelter behind a constitutionally protected act when termination is justifiable on other grounds.

> "The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the [constitutionally protected] conduct. . . . But that same candidate ought not to be able by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision." 45 U.S.L.W. at 4082.

The only scintilla of evidence adduced to support Petitioner's contention that his First Amendment rights were violated were two isolated references to the fact that Petitioner's membership in the D.E.A. was an example of his poor judgment.[1] The evidence at trial, on the other hand, established Petitioner's inability to maintain discipline at Central High School, and his poor performance as the chief administrative officer of that high school.

Even if Petitioner was fired in part because of his membership in and advocacy for the teacher's union (which Respondents do not concede), that membership and advocacy will not shelter him from termination for other job performance inadequacies or shortcomings. See, *Mt. Healthy, supra.* Once again any error in the record inured to Petitioner's benefit, and is therefore harmless.

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[1] Cf. Justice Marshall in *Pickering v. Board of Education*: "We also note that this case does not present a situation in which a teacher's [activities] . . . call into question his fitness to perform his duties . . . In such a case, of course, the [activities] would merely be evidence of the teacher's general competence, or lack thereof, . . ." 391 U.S. 563 at 573 fn. 5 (1968).

CONCLUSION

The Eighth Circuit Court of Appeals review of facts considered by the jury was limited to a determination whether Petitioner had proved enough to generate a fact question for jury determination. The Court of Appeals decided that under the applicable law, no evidence had been introduced which would warrant a verdict in favor of Petitioner and that therefore the trial court erred in submitting the case to the jury. The error of the trial court, however, was harmless because Petitioner received more than his due. Petitioner points to no issue of overriding national or constitutional significance requiring a decision or examination by this Court. The Petition for Certiorari should be denied.

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